

No. 14707

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD E. ROGERS, doing business as HOWARD E. ROGERS
Co.,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate of
HOWARD E. ROGERS, etc.,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Statement of the Case.

The record discloses that prior to bankruptcy herein, the bankrupt was engaged in the produce business, and on or about September 15, 1952, the bankrupt made and delivered a financial statement, in writing, to the Produce Reporter Company, a national mercantile agency, which publishes financial ratings of persons engaged in the produce business. [R. beg. p. 25.]

This statement was given to the Produce Reporter Company by the bankrupt for the purpose of securing and maintaining credit.

This financial statement, which was admittedly false, was the basis for the specification of objection to the bankrupt's discharge.

Question Presented.

This appeal attacks the correctness of the Court's order denying the bankrupt's discharge upon the ground set forth in Specification No. 1 of said objections, alleging a violation under Section 14c(3) of the Bankruptcy Act.

Summary of the Evidence.

That while the bankrupt was engaged in the produce business and on September 15, 1952, he made and published a materially false financial statement, in writing, respecting his financial condition. This statement was given to the Produce Reporter Company by the bankrupt for the purpose of securing and maintaining a rating of credit.

That while the financial statement, Objector's Exhibit 1, shows a net worth of \$57,484.37 as of July 31, 1952, yet an audit of the books of the bankrupt as of this date shows a hopelessly insolvent condition. [See testimony of Mr. Mulherin, beg. R. 32.]

In the Produce Reporter Company's Blue Book of 1952, published about April 1, 1952, the financial rating of the bankrupt was "25M or \$25,000.00" [R. pp. 28-29]; that although the Produce Reporter Company received this financial statement on September 15, 1952, it did not then change this financial rating; although the bankrupt's rating was changed on October 24, 1952 [see R. p. 43], it still showed a good condition which it would not have shown had the financial statement above mentioned re-

flected the true financial condition of the bankrupt. [R. pp. 50-51.]

Mr. Mulherin's report clearly shows that the bankrupt was insolvent at the time this financial statement was given, which substantiates the Referee's finding that the financial statement was knowingly false.

That between November 1 and 20, 1952, Williams Farms Company, Inc., sold to the bankrupt [R. p. 38] on credit, between \$25,000.00 and \$30,000.00 of fresh carrots; that in extending credit to the bankrupt, Williams Farms Company, Inc., examined the Blue Book and weekly reports, of the Produce Reporter Company, showing the credit rating of the bankrupt and relied upon the rating given the bankrupt in the Produce Reporter Company's Blue Book and weekly reports, to which it was a subscriber [R. p. 56], and would not have extended credit to the bankrupt had his true financial condition been shown; that while Williams Farms Company, Inc., did not personally see the false financial statement, it did see all of the reports of Produce Reporter Company, Inc., which, as shown, were made up from information received, including the financial statement [R. pp. 55-56], and relied upon same in extending credit.

The testimony of Raymond W. Gordon, T. M. Mulherin and J. E. Miller [R. pp. 25-79, incl.], and the documentary evidence clearly supports the findings of the Referee. [See also Ref. Memo. Op. at R. p. 81.]

ARGUMENT.

**Did the Williams Farms Company, Inc., Rely Upon
the False Financial Statement of the Bankrupt in
Extending Credit to Said Bankrupt?**

The Courts have held upon more than one occasion that where a false financial statement, in writing, is given to a credit agency for the purpose of securing or maintaining the maker's credit rating, and where a creditor relies upon a report of the credit agency in extending credit to the maker of the financial statement, such reliance is sufficient to support a denial of a discharge in bankruptcy where the other elements warranting a denial of a discharge have been proven.

Yates v. Boteler (C. C. 9th), 163 F. 2d 953.

In the above case, Dun & Bradstreet prepared a report, which went out to its subscribers, some of whom later became creditors of Yates, which contained much information not given by the bankrupt, but also accurately embodying the figures that the bankrupt had given to the credit agency. With reference to this, the Court says at page 955:

“The fact that other material was also included, and the possibility that the outside material might have contributed to the granting of credit, does not excuse the appellant for the falsity of the information that he did give out. A creditor's *partial* reliance upon false information given by the bankrupt is sufficient to bar a discharge. 1 Collier on Bankruptcy, 14th Ed. §14.39, p. 1347; *Id.*, 1946 Cum. Supp. p. 199.”

and again the Court says at page 956:

“As we have already seen in connection with the appellant's objections to Finding No. 1, ‘a false

statement made to a mercantile agency *for general use* is unquestionably a basis for the denial of a discharge.' 1 Collier, §14.42, p. 1357, *supra*."

The Court also says at page 956:

"Finally, it is contended that the creditor who relied upon the showing as to the appellant's net worth 'only saw the letter written by Dun & Bradstreet, and not the estimated statement signed by the bankrupt.' The speciousness of this argument is readily discerned when we remember that 'a false statement made to a mercantile agency for general use is unquestionably a basis for the denial of a discharge.' 1 Collier on Bankruptcy, §14.42, p. 1357; *In re Cloutier Bros.*, D. C. Me., 228 F. 569, 570.

Indeed, so unimportant is the *form* in which a false financial statement comes to the attention of the relying creditor, that even a false chattel mortgage has been held to be a 'materially false statement in writing.' *In re Powell*, D. C. Md., 22 F. 2d 239, 240.

2. *The financial statement was given to Dun & Bradstreet by the appellant for the purpose of obtaining credit, and credit was extended to him thereon, particularly by Earle M. Jorgensen Co. which still remains an unpaid creditor in the bankruptcy proceeding in the sum of \$4786.50."*

The only difference between the information furnished by Dun & Bradstreet in the *Yates* case and the information furnished by Produce Reporter Company is that Dun & Bradstreet wrote a letter to its subscribers, which contained much information not contained in the *Yates* financial statement, and in the instant case the information was given out in book form and the information given was by letters or figures, indicating certain things, the

directions in the book showing what each set of letters or figures meant.

Counsel for the bankrupt indicates that the change made by the Produce Reporter Company on October 24, 1952, was the result of the financial statement, but this is not the evidence. The evidence shows that the Blue Book for 1952 was published in April, 1952, and it showed a financial rating of "25M" or \$25,000.00. That the Produce Reporter Company would not show anything on the bankrupt unless there was a reported change in his financial condition; that if there were a reported change the same would appear in the next week's issue [R. pp. 42 and 50]; that although the financial statement was received by Produce Reporter Company on September 15, 1952, there was no noticed change in the status of the bankrupt until October 24, 1952, all of which means that there was nothing in the financial statement to change the rating previously given of the bankrupt of "25M" shown in the Blue Book itself. Had the financial statement stated the true facts, however, there would have been a change. [R. p. 50.]

One cannot read the testimony of Mr. Gordon [Record beginning at p. 25] without seeing that there were other conflicting reports coming in which prompted the report of October 24, 1952. But even so, the bankrupt was still shown as a good risk whereas he would not have been so shown had the financial statement revealed the true facts. [R. p. 50.]

There is no substantial difference between the reports given by Dun & Bradstreet and those given by Produce Reporter Company. Both are mercantile agencies.

1 Collier on Bankruptcy (14th Ed.), p. 1356, Sec. 14.42.

The very purpose for which Williams Farms Company, Inc., subscribed for the Blue Book was to keep informed as to the financial condition of produce dealers, and at the time the bankrupt gave the false financial statement to Produce Reporter Company, he knew that his financial condition, as shown in the false financial statement would be reflected in the reports of the Produce Reporter Company.

A partial reliance on the false statement is sufficient to sustain an objection to the discharge, and there may be a sufficient reliance on the false statement even though the creditor has made an independent investigation of the debtor's financial status. (*In re Banks*, 181 F. 2d 309.)

While there must be at least a partial reliance, as stated in the case of *In re Banks*, above cited, this partial reliance may flow from a report by a mercantile agency as stated by our own Circuit Court in the case of *Yates v. Boteler*, above cited.

And, also, it is not necessary for the creditor who relies upon the false financial statement to make the objection. See *In re Haggerty*, 165 F. 2d 977 at 980, wherein the Court says:

“And, as we said in *In re Ernst*, 2 Cir., 107 F. 2d 760, it is of no significance that the creditor to whom the bankrupt gave the materially false written statement has been paid and is not objecting to the discharge.”

See also:

In re Leonard, 122 Fed. Supp. 214 (this District).

The Referee has made findings, clearly supported by the evidence, and findings of a Referee may be upset only when they are clearly erroneous. [See Referee's remarks, R. p. 81.]

See also:

General Order 47;

Knetzer v. Larkin, 178 F. 2d 532;

In re Leonard, 122 Fed. Supp. 214 (this District).

We submit that it is clear that the bankrupt made and published the false financial statement for the purpose of securing and maintaining credit. The bankrupt knew the purpose for which the Produce Reporter Company would use this financial statement, to-wit: that of fixing his credit rating in its Blue Book. The Referee found that the creditor relied thereon in extending credit. [See Finding (f), R. p. 14.]

The Court concludes [see Conclusions (b) and (c), R. p. 15] that if the financial statement had revealed the true financial condition of the bankrupt the credit would not have been extended.

The Referee, in his Memorandum of Opinion, points out that the bankrupt failed to meet the burden of proof imposed upon him under the law, and the bankrupt has not attempted to answer this rather patent argument.

We respectfully submit that the order appealed from should be sustained.

Respectfully submitted,

ERNEST R. UTLEY,

Attorney for Appellee.